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No. 03-735

In The Supreme Court of the United States

THOMAS L. ENGLISH, ESQ.,

Petitioner,

v.

HONORABLE MARTHA VAZQUEZ,
U.S. DISTRICT JUDGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
REASONS FOR GRANTING THE PETITION	2
A. Fairness Demands That Lawyers Have Standing to Appeal Injuries to Their Most Vital Asset – Their Reputation	3
1. Judicial censure damages lawyers' professional reputations beyond measure	3
2. A rule precluding appellate review of written findings of professional misconduct disproportionately damages government attorneys	5
B. The Court Should Take This Opportunity to Resolve a Long-Standing Circuit Split and Create a Uniform Rule Giving Lawyers Standing to Appeal Written Findings of Professional Misconduct	8
1. Majority Approach: Appealable	9
2. Minority Approach 1: Sometimes appealable	10
3. Minority Approach 2: Unappealable	10
4. Inconsistent standards create unfairness and uncertainty	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Bolte v. Home Ins. Co., 744 F.2d 572 (7th Cir. 1984).....11

Butler v. Biocore Med. Tech., Inc., ___ F.3d ___, 2003 WL 22481781 (10th Cir. Nov. 4, 2003).....9, 12

Clark Equip. Co. v. Lift Parts MFG. Co., Inc., 972 F.2d 817 (7th Cir. 1992).....11

Committee on Legal Ethics of West Va. Bar v. Roark, 382 S.E.2d 313 (W. Va. 1989) 5

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)..... 3

EEOC v. Datapoint Corp., 457 F. Supp. 62 (W.D. Tex. 1978) 5

FDIC v. Tefken Constr. & Installation Co., 847 F.2d 440 (7th Cir. 1988) 3

Fromson v. Citiplate, 886 F.2d 1300 (Fed. Cir. 1989)..... 9

In re Williams, 156 F.3d 86 (1st Cir. 1998).....6, 10

Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003).....9, 10

Starcher v. Correctional Med. Sys., Inc., 144 F.3d 418 (6th Cir. 1998) 5

Sullivan v. Committee on Admissions and Grievances, 395 F.2d 954 (D.C. Cir. 1967) 9

Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) 3

United States v. Gonzales, 344 F.3d 1036 (10th Cir. 2003).....12

United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992)..... 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Talao, 222 F.3d 1133 (9th Cir. 2000) 6, 10

Walker v. City of Mesquite, 129 F.3d 831 (5th Cir. 1997) ..... *passim*

STATUTES

28 U.S.C. § 1291 11

COURT RULES

SUP. CT. RULE 10 3

SUP. CT. RULE 37 1

OTHER AUTHORITIES

ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. (1994) 5

Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 WASH. L. REV. 851 (1989) 3

NMSA 1978, Rule 17-206(A) 8

Steve Lubet, *Just Who Made Federal Judges God?*, CHIC. TRIB., Aug. 10, 2001 12

United States Attorney's Manual § 1-4.120 8

United States Attorney's Manual § 1-6.100 7

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Assistant United States Attorneys ("NAAUSA"), *amicus curiae*, respectfully submits this Brief in Support of Petitioner Thomas L. English's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.[1]

Pursuant to Supreme Court Rule 37(2)(a), all parties to this action have given their written consent to the filing of this brief, and copies of the consents are on file with this Court.

STATEMENT OF INTEREST

NAAUSA is a professional, non-profit, non-governmental corporation founded to promote and protect the career and professional interests of Assistant United States Attorneys. NAAUSA serves as a resource for policy makers in the executive and legislative branches and helps educate them with regard to issues that concern NAAUSA's members. Since its incorporation in 1992, NAAUSA has become involved in a number of policy debates affecting the federal law enforcement community, including compensation and pension issues, immunity

[1] Pursuant to Supreme Court Rule 37(6), no part of this brief was authored by counsel for the petitioner, and all monetary contributions for the preparation and submission of this brief have or will come from NAAUSA, except to the extent that counsels' services have been provided *pro bono publico*.

protection for prosecutors and other government attorneys, and federal criminal legislation. Currently, NAAUSA has over 900 members with representatives in every United States Attorney's Office and practicing in every federal circuit. NAAUSA has a strong interest in the resolution of the issue of whether attorneys may appeal final, written orders containing findings of attorney misconduct. Moreover, NAAUSA believes it is in a special position to help this Court understand the importance this issue has to government and public service lawyers, among others.

REASONS FOR GRANTING THE PETITION

Thomas English's reality is every attorney's nightmare. As the Petition ably details, groundless accusations of prosecutorial misconduct triggered a chain of events that publicly ravaged Mr. English's professional reputation and left him without legal recourse. Mr. English, attempted to appeal a district court's specific, written findings of professional misconduct, but the Tenth Circuit dismissed his appeal for lack of standing, concluding that he had not suffered a sanction and therefore demonstrated no legally cognizable injury. That decision represents more than a personal miscarriage of justice for Mr. English; it vividly illustrates a scenario feared by all attorneys practicing before federal courts.

NAAUSA urges this Court to grant certiorari and create a uniform rule allowing appellate review of written judicial findings of attorney misconduct. The Tenth Circuit's decision offends basic notions of due process and fundamental fairness by denying attorneys the right to

appeal injuries to their professional reputations. *See* SUP. CT. RULE 10(a). Moreover, Mr. English's case presents an opportunity to resolve a profound circuit split. *See id.* Seven Circuits have addressed this issue, and three distinctly different approaches have emerged. Consequently, the ability to appeal a written finding of professional misconduct is a matter of geography rather than a matter of right. The resulting uncertainty harms lawyers and judges alike, and this Court should use this case as a vehicle to create a much-needed consistent rule.

A. Fairness Demands That Lawyers Have Standing to Appeal Injuries to Their Most Vital Asset – Their Reputation.

1. Judicial censure damages lawyers' professional reputations beyond measure.

The Tenth Circuit ignored the reality of the legal profession when it concluded that Mr. English was not injured by the district court's written finding of professional misconduct. In fact, lawyers' "most precious asset is their professional reputation." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part); *see also Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997) (stating "one's professional reputation is a lawyer's most important and valuable asset."). And because "[a] lawyer's reputation for integrity, thoroughness, and competence is his or her bread and butter," *FDIC v. Tefken Constr. & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988), "criticism delivered from the bench . . . can . . . damage a lawyer's reputation and career." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988); *see also* Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 WASH.

L. REV. 851, 864 (1989) ("Public criticism of a lawyer in an opinion . . . may destroy or severely damage a lawyer's reputation.").

Technological innovations in legal research increase the damage done by a written reprimand from the bench. Databases like Westlaw and Lexis make court opinions and orders widely available and easily searchable. Prospective employers, other judges, or opposing counsel can dredge up past rebukes simply by searching for an attorney's name on a legal search engine. Unlike a simple monetary sanction that is paid and finished, written findings of professional misconduct permanently injure attorneys by staining their reputations.

The case at bar illustrates the corrosive effect of a written censure. Mr. English was one of four candidates for United States Attorney that U.S. Senator Pete Domenici submitted to the White House. *See* Petition for Writ of Certiorari at 12 n.5. His nomination was the culmination of a lifetime of service. *Id.* Unfortunately, the district court issued its public criticism of Mr. English while his nomination was being considered. *Id.* While it is impossible to say whether Mr. English would have secured the position if he had not been sanctioned, it is safe to say that the district court's rebuke lessened his chances.

Written criticism of an attorney's professional acumen or integrity, then, constitutes a legally cognizable injury because it does both immediate and long-term damage to an attorney's career. *See United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992) (recognizing that "published opinions chastising" counsel constitute a "serious sanction"). Consequently, principles of due process and fundamental fairness demand that a written finding of

professional misconduct confer standing to appeal. *See Walker*, 129 F.3d at 832 (rejecting "out of hand" the argument that an attorney lacked standing to appeal the court's declaration that he engaged in blatant misconduct); *see also* ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. at 18 (1994) (stating that the right to appeal an adverse determination is "a fundamental element of procedural fairness as generally understood in this country").

2. A rule precluding appellate review of written findings of professional misconduct disproportionately damages government attorneys.

The Tenth Circuit's decision particularly concerns NAAUSA because the consequences of a rule precluding appeals from written findings of attorney misconduct fall disproportionately on attorneys employed by the government. Anecdotally, NAAUSA's membership reports that making allegations of misconduct against government attorneys has emerged as a routine litigation tactic used to procure default judgments, preclude witness testimony, or obtain other strategic advantages. *Cf. Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 425 (6th Cir. 1998) ("requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses"). At the same time, courts frequently hold government attorneys to a more rigorous standard of competence and ethical probity than a similarly situated private attorney. *See, e.g., Committee on Legal Ethics of West Va. Bar v. Roark*, 382 S.E.2d 313, 318 (W. Va. 1989) ("courts have uniformly viewed the [government] lawyer's misconduct as more egregious because of the betrayal of the public trust attached to the office"); *EEOC v. Datapoint*

Corp., 457 F. Supp. 62, 63 (W.D. Tex. 1978) ("Because of the peculiar power of the government litigator, he is subject to ethical considerations beyond the ordinary litigator."). The trend towards using accusations of misconduct as a litigation tactic, coupled with courts' efforts to police government misconduct, puts government attorneys at a higher risk for suffering an undeserved sanction.

Because sanctions against government attorneys often take the form of a written rebuke, the Tenth Circuit's decision also means that government attorneys face a higher risk of suffering an undeserved and *unappealable* sanction. Many judges realize that government attorneys are salaried workers whose advocacy and heavy caseloads are not driven by pecuniary interests. Consequently, judges often choose to sanction a government attorney with a written censure rather than a monetary fine. *See, e.g.*, *United States v. Talao*, 222 F.3d 1133, 1136 (9th Cir. 2000) (involving a district court's written finding of a government attorney's professional misconduct); *In re Williams*, 156 F.3d 86, 88 (1st Cir. 1998) (same). Thus, while a private practitioner may receive and appeal a $100 fine, his governmental counterpart all too often receives an undeserved written censure of his professional conduct that leaves him with no legal recourse. *Walker*, 129 F.3d at 832.

Additionally, government attorneys cannot avoid written professional censure by taking preventative steps in the same way that private practitioners can. A private attorney can reduce the chances of receiving such a rebuke by refusing to take a case that requires him or her to appear in a court that is prone to give them or by charging the client a higher fee to compensate for the risk to his or

her reputation. Neither is an option for a government attorney.

Moreover, government attorneys face special difficulties defending themselves against such judicial censure. For example, a government attorney must obtain permission from the Department of Justice in order testify on his own behalf. *See* United States Attorney's Manual Secton 1-6.100 (noting that "no present or former employee of the Department of Justice may testify ... in response to subpoenas or demands of courts or other authorities issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official" when that testimony relates to "[a]ny information acquired by an employee of the Department as a part of the performance of that employee's official duties"). As this case demonstrates, the government hesitates to grant permission because it fears that the government attorney will be unable to continue working on the case if he or she becomes a witness. As the Petition notes, Mr. English requested leave to testify on his own behalf and attempt to set the record straight about his conduct, in the hopes of avoiding the imposition of sanctions, but the government refused to allow him to do so. *See* Petition for Writ of Certiorari at 6. Because their position as government attorneys often hampers their efforts to defend themselves against accusations of professional misconduct at the trial court level, government attorneys are unfairly and disproportionately impacted by a rule prohibiting appeals from written findings of professional misconduct.

The inability to appeal written findings of professional misconduct spells disaster for the careers of government attorneys. A written rebuke has immediate negative

consequences for a government attorney because it triggers further internal investigation and disciplinary action. All Department of Justice attorneys, for example, must report to their supervisors any "statements by a judge or magistrate indicating that misconduct by a Department employee has occurred." *See* United States Attorney's Manual Section 1-4.120(A). In addition, Department of Justice lawyers must immediately report a finding of misconduct to the Department of Justice Office of Professional Responsibility. *See id.* at 1-4.120(B). The ensuing internal investigations may result in the attorney being terminated or disbarred. *See* NMSA 1978, Rule 17-206(A) (Rules Governing Discipline).

While government attorneys should be – and are – held to the highest professional and ethical standards, public service to the United States should not carry with it an unfair risk of incurring an unappealable decision that permanently damages the attorney's reputation for professionalism and integrity. This Court can eliminate this fundamental unfairness by establishing a clear rule allowing appeals from written findings of professional misconduct.

B. The Court Should Take This Opportunity to Resolve a Long-Standing Circuit Split and Create a Uniform Rule Giving Lawyers Standing to Appeal Written Findings of Professional Misconduct.

Given the damage a written rebuke of professional conduct does to a lawyer's career, the ability to appeal it should be a matter of right, but, as it stands, it is a matter of geography. An acknowledged and profound circuit split exists on whether a court's written finding of attorney misconduct may be appealed when it is not labeled a

"sanction" and no monetary penalty accompanies it. Seven circuits have considered the issue, and three distinct approaches have emerged.

1. Majority Approach: Appealable.

The majority approach allows attorneys to appeal written findings of professional misconduct, regardless of how the findings are labeled or whether they are accompanied by a fine. The Fifth, Federal, and District of Columbia Circuits adopt this approach. *See Precision Specialty Metals, Inc. v. United States*, 315 F.3d 134, 1346 (Fed. Cir. 2003) (characterizing a reprimand of an attorney's conduct in an *unpublished* opinion as a "sanction" and acknowledging the propriety of appellate review); *Walker*, 129 F.3d at 832-33 (allowing an attorney to appeal an *unpublished* finding that he violated his obligation of candor and rejecting "out of hand" the argument that monetary damages are a necessary prerequisite for appellate jurisdiction); *Fromson v. Citiplate*, 886 F.2d 1300, 1304 (Fed. Cir. 1989) (allowing an attorney to appeal from an opinion that "commented unfavorably" on his conduct and characterizing the comment as "a sanction"); *Sullivan v. Committee on Admissions and Grievances*, 395 F.2d 954, 956 (D.C. Cir. 1967) (concluding that a determination that an attorney "was guilty of proscribed conduct" gave "him standing to appeal"). Shortly after the decision at issue in this case, the Tenth Circuit adopted the majority approach as well. *See Butler v. Biocore Med. Tech., Inc.*, __ F.3d __, 2003 WL 22481781 (10th Cir. Nov. 4, 2003) (page numbers unavailable) (holding that "an order . . . affecting an attorney's professional reputation imposes a legally sufficient injury to support appellate jurisdiction"). These

courts correctly reason that "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a prerequisite for the appeal of a court order finding professional misconduct." *Walker*, 129 F.3d at 833; *see also Precision*, 315 F.3d at 1346; *Sullivan*, 395 F.2d at 954, 956.

2. Minority Approach 1: Sometimes appealable.

A minority approach gives lawyers standing to appeal when the rebuke at issue satisfies specific criteria, though the relevant criteria are not the same for all the courts following this approach. The First Circuit falls into this category and allows attorneys to appeal orders damaging their professional reputations only when the challenged order is "expressly identified as a reprimand." *Williams*, 156 F.3d at 92. Similarly, the Ninth Circuit falls into this category, but uses different criteria. The Ninth Circuit allows attorneys to appeal from orders that are "inordinately injurious to a lawyer's reputation" but does not allow appeals from orders that amount to mere "routine judicial commentary." *Talao*, 222 F.3d at 1137. The Ninth Circuit considers an order "inordinately injurious" when it concludes that an attorney knowingly and willfully violated an ethical rule. *Id.* at 1337-38. This minority approach exalts form over substance and puts arbitrary parameters on an attorney's right to appeal damaging rebukes.

3. Minority Approach 2: Unappealable.

Another minority approach concludes that an attorney can never appeal a written finding of professional

misconduct in the absence of a monetary sanction. The Seventh Circuit alone follows this approach. *See Clark Equip. Co. v. Lift Parts MFG. Co., Inc.*, 972 F.2d 817, 820 (7th Cir. 1992) ("[A]n attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects."); *see also Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984). In *Bolte*, the Seventh Circuit recognized the potential harm that a rebuke can do to an attorney's professional reputation, but balanced this potential harm against perceived practical concerns such as "congested appellate dockets and . . . the difficulty of assuring an adversary contest in most such appeals." *Bolte*, 744 F.2d at 572-73. As a result of this balancing test, the court concluded that written findings of misconduct are not final decisions, determining that "Congress, in making 'final decisions' of district courts appealable in 28 U.S.C. § 1291" did not mean "to allow people who were not even parties to a lawsuit in the district court to appeal from a wounding or critical or even palpably injurious comment or finding by a district judge." *Id.* at 573. In reaching the opposite conclusion, the Fifth Circuit aptly criticized the Seventh Circuit's reasoning as unfair and unrealistic: "stripped to its essentials [the Seventh Circuit approach] would maintain that an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct." *Walker*, 129 F.3d at 832.

As a consequence of the minority approaches, district judges can use their bully pulpit to tarnish a lawyer's reputation without the prospect of appellate review by criticizing the lawyer without labeling the order as a

"sanction" or imposing a monetary fine. *See* Steve Lubet, *Just Who Made Federal Judges God?*, CHIC. TRIB., Aug. 10, 2001, at 23.

4. Inconsistent standards create unfairness and uncertainty.

As Petitioner English points out, "[i]t is ironic that the profession charged with protecting due process rights has not achieved a fair standard for itself in this area." Petition for Writ of Certiorari at 14. Indeed, it is more than ironic; the absence of a consistent standard on this issue is fundamentally unfair to every attorney practicing before federal courts. Due process demands that every attorney – everywhere – have the right to appeal a written finding of professional misconduct.

Mr. English's case, in particular, vividly illustrates the pressing need for a uniform rule because it reveals that an attorney's access to appellate review hinges not only on which circuit court decides the issue, but also on *when* a circuit court decides the issue. The Tenth Circuit dismissed Mr. English's appeal for lack of standing over a vigorous dissent. *See United States v. Gonzales*, 344 F.3d 1036 (10th Cir. 2003). A few months later, however, the Tenth Circuit adopted the dissent's view and allowed a different attorney to appeal findings of misconduct made against him. *See Butler*, 2003 WL 22481781. This change came too late to help Mr. English, however, and demonstrates the unjust and very personal consequences suffered by attorneys around the nation due to the absence of a single, controlling decision on this issue.

Moreover, uncertainty about the availability of appellate review threatens to chill zealous advocacy. There is an

inherent tension between the threat of sanctions and zealous representation, and the availability of appellate review of sanctions plays a key role in maintaining the proper balance. The balance becomes badly skewed when the right to appeal is uncertain, as it is with written findings of attorney misconduct, and a lawyer's professional reputation can be summarily destroyed by the finding of a trial judge with no possibility of appeal. As a result, attorneys may be less inclined to pursue their clients' positions to the fullest extent of the law.

A consistent standard for the availability of appellate review would also benefit federal judges. A rule making clear, for example, that a court's written findings of attorney misconduct are appealable, while oral statements made in the courtroom are not, would helpfully clarify the nature and consequences of the alternative means available to federal judges for punishing attorney misconduct.

In sum, the ability to obtain judicial review of a published opinion condemning "a lawyer's most valuable asset," *Walker*, 129 F.3d at 832, simply should not depend on the geographic location of the federal court issuing the opinion or the month in which the federal court issued the opinion. The uncertainty surrounding this issue harms both attorneys and judges and – as Mr. English's case demonstrates – allows miscarriages of justice. Consequently, this Court should grant Mr. English's petition and provide a much-needed uniform rule.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the National

Association of Assistant United States Attorneys, *amicus curiae*, respectfully submits that Mr. English's petition should be granted.

Respectfully submitted,

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